IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1833

CHARLES MEYERS and JACK SCOVILLE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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To the United States Court of Appeals for the Seventh Circuit

Petitioners, JACK D. SCOVILLE and CHARLES MEYER, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered on February 12, 1976 reversing and remanding the District Court's order of June 17, 1975, which had dismissed the Indictment against petitioners. The Seventh Circuit denied the petition for rehearing *en banc* on May 21, 1976. Chief Judge Fairchild, Judge Swygert and Judge Sprecher voted to grant a rehearing *en banc*.

Reference to Opinions Below

United States v. Charles Meyer and Jack Scoville, 395 Federal Supplement 1070 (1975) (Appendix B);

United States v. Charles Meyer and Jack Scoville, U.S.C.A. 7 No. 1743 (Appendix C);

United States v. Charles Meyer and Jack Scoville, Order Denying Rehearing U.S.C.A. 7 No. 1743 (Appendix D).

JURISDICTION

Petitioners seek to have reviewed the decision of the Seventh Circuit Court of Appeals entered on February 12, 1976, reversing an Order of the District Court for the Eastern District of Illinois dated June 17, 1975 which dismissed the Indictment against Defendants. Rehearing was denied on May 21, 1976. Chief Judge Fairchild, Judge Swygert and Judge Sprecher voted to grant a rehearing *en banc*.

The jurisdiction of this Court is envoked pursuant to 28 United States Code §1254 (1).

QUESTION PRESENTED

May a person who is not a public official, but is a candidate for office, violate the Hobbs Act, 18 United States Code §1951, by conspiring to commit "extortion" by obtaining property "under color of official right."

STATUTE INVOLVED

18 United States Code §1951:

Section 1951. Interference With Commerce by Threats or Violence.—(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens

physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or future, to his person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 45. (June 25, 1948, c.645, § 1, 62 Stat. 793.)

STATEMENT OF FACTS

Defendants CHARLES MEYERS and JACK SCOVILLE were charged, by Indictment, (Appendix A), with a violation of the Hobbs Act 18 U.S.C. § 1951 charging them with conspir-

ing to commit extortion by obtaining money from others under color of official right. The Government and the defendants stipulated to certain facts (Appendix E) for the purpose of a Motion seeking to dismiss the indictment, the Motion was granted (Appendix B).

In October of 1972 the defendants were candidates for the position of Trustees of the East Side Sanitary District. They were elected in November of 1972 and assumed office in December of 1972. The stipulated facts were, if the defendants received any money it was received in October 1972, before their election and assumption of office. The Indictment charged that defendants entered into a conspiracy to effect commerce by extortion by obtaining property from another, with his consent induced under color of official right.

The defendants, by Motion, stated that the money paid, could not have been induced under color of official right because defendants were private citizens at the time of the alleged payment of money (no act in furtherance of the conspiracy is alleged following defendants election, and none occurred).

The District Court dismissed the Indictment stating that while private persons could violate the Act by use of fear that "under color of official right" did not apply to extortionate acts committed by private persons, and that the defendants were not public officials at the time of the occurrence.

The Seventh Circuit Court of Appeals reversed the District Court stating that "we think it no less of a crime under the Hobbs Act to sell one's public trust before rather than after one is installed in office." Rehearing was denied. Chief Judge Fairchild, Judge Sprecher, and Judge Swygert voted for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

We submit to the Court that the Writ should issue for several compelling reasons: first, an important question of Federal Law is presented which has not been settled by this Court and, second, that the decision of the Seventh Circuit is clearly at odds with the history and interpretation of the Hobbs Act.

The Defendants were not public officials at the time of the alleged payment of money. The setting of the alleged offense is that Defendants are alleged to have taken a sum of money a little more than a month prior to their election to office in December of 1972. There is no overt act alleged after they assumed office, and indeed, none occurred and at least in regard to defendant Scoville, the money was returned.

Judge Perry, a senior District Judge sitting by designation on the Seventh Circuit stated "We think it is no less a crime under the Hobbs Act to sell one's public trust in office, before rather than after one is installed in office." (Appendix C, page A-17) We suggest this logic is wrong, and that it flies in the face of cases decided by other panels of the Seventh Circuit and other circuits.

The Indictment sounds in extortion. The Hobbs Act specifically defines the term extortion:

> The term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence of fear, or under color of official right. 18 U.S.C. Section 1951 (2).

The defendants, arguendo, admitted the receipt of money, but suggested to the trial court that since they were not elected officials at the time of receipt of the money, or at the time they conspired to receive the money, they, therefore, could not com-

mit extortion under color of official right, and in order for the Indictment to stand, there must be evidence of some proscribed act after their election. The District Court agreed: "A mere candidate for public office cannot obtain property from another with that persons consent, under color of official right." *United States v. Meyer*, 395 F. Supp. 1067, 1070 (1975).

If the Defendants were then private citizens when they allegedly received the money, could they violate the Hobbs Act? The answer is yes, but only by the use of fear or force. In *United States v. Kenny*, 462 F. 2d 1205 at 1229 (3rd CA 1972), the Court stated:

> "But while private persons may violate the statutes *only* by the use of fear . . . persons holding public office may also violate the statute by a wrongful taking under color of official right." (Emphasis added)

Kenny further states "That it has been held that the 'under color of official right' language may have no applicability to extortionate acts committed by private individuals." *Kenny* at 1229.

This language in *Kenny* was specially approved by another panel of the Seventh Circuit in *United States v. Crowley*, 504 F.2d 992 (7CA 1974). It is interesting to note that two of the three Judges in that panel were two of the three Judges who voted for rehearing en banc herein, Judges Swygert and Sprecher.

An interesting case, recently decided, *United States v. Mazzei*, 521 F. 2d 639 (3rd CA), cert. denied, 96 S. Ct. 446, runs a close parallel to the present case, in that case a State Senator who received money for influence peddling was held to come within the orbit of the Hobbs Act "under color of official right" even though he did not have the actual authority to do the illegal act. The Court held that his office and apparent authority were sufficient to sustain the charge. In *Mazzei* the Court enunciated what we believe to be the gravamen of a Hobbs Act violation of permissive extortion by a public official.

> "A violation of the statute may be made out by a showing that a public official through wrongful use of his office obtains property not due him or his office even though not accomplish by fear or force." *United States v. Mazzei*, 521 F. 2d 639 at 645.

(We commend to this Court the dissent of Judge Gibbons in *Mazzei* which reflects an accurate and enlightening historical perspective of the Hobbs Act and permissive extortion by public officials.)

In the present case the trial court held in dismissing the Indictment that:

> "The Government's attempts to expand the jurisdiction of the Hobbs Act stretch that statute beyond its breaking point. A mere candidate for public office cannot obtain property from another with that person's consent induced under color of official right." *United States v. Meyer and Scoville*, 395 F. Supp. 1067, 1070 (1975).

We submit the language of the Seventh Circuit indicates the fault in their logic, "We think it is no less a crime under the Hobbs Act to sell one's public trust before, rather than after, one is installed in office." (Appendix C, page A-17) This language indicates that the panel apparently is willing to extend the Hobbs Act to make it include all acts of official misconduct, even inchoate official misconduct and illegal campaign contributions.

Looking at this particular statute and the particular facts of this case the Court can see that the Hobbs Act was not meant to apply to these Defendants. The Hobbs Act prohibits robbery and extortion. Extortion is specifically defined in the act.

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." 18 U.S.C. § 1951 (2).

In this case the proscribed act—the taking of money occurred, per the stipulated fact, prior to the defendant's election to office, therefore their conduct at that time must have violated the Hobbs Act or the indictment should have been dismissed.

The Seventh Circuit made much of the fact that the Defendants were charged with conspiracy to violate the act, and that one can conspire to commit extortion under color of official right. We agree but, the Indictment must allege some extortionate act to be committed after assumption of office which it did not.

Was the Hobbs Act designed by Congress to police illegal campaign contributions. Is it fair for the Courts to hold a non-public official responsible for conduct of his public life before he assumes office and is made aware of his duties, his rights and responsibilities?

If the Courts allow this case to stand it will create an inchoate offense. A person who actually does not abuse his office after he assumes it (there is no allegation and was no misconduct after the assumption of office by either Defendant) may be liable as a *public official* for a private act while he was a private citizen.

We again refer the Court to the *Mazzei* case and the language of Judge Gibbons in his dissent:

> "The Supreme Court has recently reiterated that an ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity (citing cases) this rule of narrow construction is rooted in the belief that due process requires fair warning should be given as to what conduct may be subject to the sanction of the criminal law." *Mazzei* at 655.
>
> Could Scoville and Meyers have possibly be aware that the Hobbs Act "under color of official right" provision be extended to candidates for public office?

CONCLUSION

We submit that the Court should grant the Writ not only for the far reaching consequences of this decision, but also the law is in need of direction and definition of the recent, popular extension of the Hobbs Act to permissive extortion by public officials.

Respectfully submitted

BRUCE N. COOK

JAMES J. GOMRIC
Attorneys for Petitioners Charles
Meyers and Jack Scoville

APPENDIX

APPENDIX A

In the District Court of the United States of America
For the Eastern District of Illinois

United States of America, Plaintiff, vs. Charles Meyers, and Jack Scoville, Defendants.	Criminal No. 75-27-E. Title 18, United States Code, Section 1951.

The Grand Jury Charges:

1. At times pertinent hereto defendants CHARLES MEYERS and JACK SCOVILLE were trustees of the East Side Levee and Sanitary District, East St. Louis, Illinois.

2. At other times pertinent hereto defendants CHARLES MEYERS and JACK SCOVILLE were candidates for trusteeship and trustees-elect for the East Side Levee and Sanitary District.

3. At times pertinent hereto, the trustees of the East Side Levee and Sanitary District occupied a position of public trust where through the exercise of their judgment, contracts were to be awarded to contractors and suppliers doing business with the East Side Levee and Sanitary District, East St. Louis, Illinois.

4. From on or about the month of September, 1972 to on or about January, 1973, in the Eastern District of Illinois, the defendants CHARLES MEYERS and JACK SCOVILLE and others did conspire to affect commerce by obtaining property of another, with his consent, induced under color of official

right, that is to say, CHARLES MEYERS and JACK SCOVILLE with others did conspire to obtain in excess of $6,000.00, individually, that the defendants were not entitled to, in consideration for their future official acts as trustees for the East Side Levee and Sanitary District so that the defendants CHARLES MEYERS and JACK SCOVILLE would suspend their independent and unbiased judgment on the merits when considering the awarding of contracts, all in violation of Title 18, United States Code, Section 1951.

A True Bill

s/ .....
Foreman

s/ .....
United States Attorney

Bond: $5,000.00 Charles Meyers

Bond: $5,000.00 Jack Scoville

APPENDIX B

In the District Court of the United States
For the Eastern District of Illinois

United States of America, Plaintiff, vs. Charles Meyers and Jack Scoville, Defendants.	Criminal No. 75-27-E.

ORDER

Foreman, Judge:

This case presents the novel and interesting question whether candidates for political office can obtain property (i.e. $6000) from another with that person's consent induced under color of official right within the meaning of 18 U.S.C. § 1951.[1] The indictment alleges that the defendants conspired to obtain this payment in consideration for their future official acts.

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[1] The relevant portions of the statute are set forth below:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

(b) * * *

(1) * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Pursuant to a stipulation of the parties, it appears that defendants Charles Meyers and Jack Scoville were candidates for position of Trustees of the East Side Levee and Sanitary District in October, 1972. The two defendants met with the complaining witnesses during that month. The indictment charges that a conspiracy was formed at this time. It is also alleged that money was paid to the defendants in October, 1972. Subsequently Meyers and Scoville were elected Trustees on November 7, 1972 and formally assumed office on December 6, 1972.

Both defendants have filed motions to dismiss, contending that since they were not public officials they could not have received property under color of official right. The Government does not contend that the defendants were public officials at the time they received the money.

Until fairly recently there were very few prosecutions brought pursuant to § 1951 relying solely upon subsection b (2)'s definition of extortion as "the obtaining of property under color of official right." See *United States v. Staszcuk*, 502 F. 2d 875 (7th Cir. 1974). The Court has been unable to find any cases where a mere candidate for public office has been prosecuted under this sub-section.

In deciding a related issue the Third Circuit noted:

> "While private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking 'under color of official right' . . . The 'under color of official right' language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official and which did not require proof of threat, fear, or duress." *United States v. Kenny*, 462 F.2d 1205 at 1229 (3rd Cir. 1972).

The Seventh Circuit recently cited with approval this exact portion of the *Kenny* opinion. *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974).

The *Kenny* court also noted, "It has been held that the 'under color of official right' language may have no applicability to extortionate acts committed by private individuals." *Kenny* at 1229. The only case cited in support of that proposition, however, does not support the principle cited.

In perhaps the only real attempt to interpret the relevant statutory language, the Seventh Circuit stated,

> "The use of office to obtain payments is the crux of the statutory requirement of 'under color of official right,' and appellants' wrongful use of official power was obviously the basis of this extortion . . . So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974).

While this language is certainly not free from ambiguity as applied to the factual situation in the case at bar, nevertheless, it is instructive. In this case, the "crux of the statutory requirement" (i.e. the use of office) is lacking.

The Government claims that the defendants were in a viable position to obtain public office at the time they entered into the conspiracy. This viable position, the Government contends, established a reasonable basis of belief on the part of the contractors that the defendants had the power to control the awarding of contracts of the East Side Levee and Sanitary District in the future. The only two cases cited by the Government do not support this proposition and are clearly distinguishable.

In *United States v. Emalfarb*, 484 F.2d 787 (7th Cir. 1973), it is not even clear that the defendant was even indicted for the

"under color of official right" sub-section of § 1951. Moreover, the defendant in that case was working in close alliance with an elected public official. The issue in that case "was not whether the defendant had the power to have [the victim's] trucks stopped and ticketed but whether it was reasonable for [the victim] to believe he had that power." (484 F.2d at 789). In the instant case it appears that the alleged victims clearly understood that the defendants were only candidates for public office, and, of course, were unable to exercise any official power.

Similarly *United States v. Price*, 507 F.2d 1349 (4th Cir. 1975), offers no solace to the Government. In that case the defendant was Chairman of the Charleston, South Carolina County Council. He received $12,000 for his assurance that the donar motel would receive an occupancy permit. The Fourth Circuit affirmed the defendant's conviction over his objection that as County Council Chairman, he had no *de jure* power to issue the occupancy permit. In sharp contrast to the case at bar, in *Price* the defendant clearly held a public office. Moreover, in that case the Fourth Circuit approved a trial court instruction which *inter alia* defined "under color of official right" as a "wrongful taking *by a public officer* of money not due him or his office." (Emphasis added) (507 F.2d at 1350). In both *Price* and *Emalfarb*, the defendants raised the defense of impossibility, while the defendants in the instant case do not.

The Government also asserts that the defendants are charged with "obtain[ing] property under color of official right" and also points out that they are not charged with "under color of official right they conspired." The significance of this distinction, the Government claims, is that the words "under color of official right" modify conspiracy rather than the words "obtaining property from another." Even this analysis can not assist the Government because of the inescapable conclusion that the agreement to pay money to the defendants was entered prior to the time the defendants were elected. The money was also paid to the defendants prior to the time they were elected.

The defendants were never clothed with official privileges and duties, elements usually considered essential to the commission of extortion under color of official right. See 31 Am. Jur. 2d Extortion, Blackmail & Threats § 2, 35 C.J.S. Extortion § 5. Nor could they be considered *de jure* or *de facto* public officials. Furthermore, at common law and by some state statutes, extortion was a crime which only a public official could commit. See e.g. *State v. Weleck*, 10 N. J. 355, 371-372, 91 A.2d 751, 759 (1952). See generally H. Stern, Prosecutions of Local Political Corruption Under the Hobbs Act; The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall Law Review 1, 14-16. In *United States v. Nardello*, 393 U.S. 286, 289 (1969), Chief Justice Warren stated, "At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion." These cases, of course, are not binding in the instant case, but they are helpful, because in construing a federal criminal statute, which uses a term of established common law meaning, the general practice is to apply that meaning to the term. *United States v. Turley*, 352 U.S. 407, 411 (1957).

The Government's attempts to expand the jurisdiction of the Hobbs Act stretch that statute beyond its breaking point. A mere candidate for public office cannot obtain property from another with that person's consent induced under color of official right.

Accordingly, defendants' Motion to Dismiss are hereby Granted.

Dated: .....

/s/ .....
United States District Judge

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1743

United States of America,
Plaintiff-Appellant,

v.

Charles Meyers and Jack Scoville,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Illinois—No. 75-27-E
James L. Foreman, Judge

Argued December 12, 1975—Decided February 12, 1976

Before Cummings, Circuit Judge, Bauer, Circuit Judge, and Perry, Senior District Judge.*

Perry, Senior District Judge. Defendants Charles Meyers and Jack Scoville were indicted by the Grand Jury for the Eastern District of Illinois upon a charge that they entered into a conspiracy to affect commerce by extortion in violation of the Hobbs

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* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

Act, 18 United States Code, Section 1951.[1] The defendants moved to dismiss the indictment and the district Court granted the motion. On appeal the Government asks this court to remand the case and direct the District Court to reinstate the indictment. We reverse and remand.

The indictment charged:

1. At times pertinent hereto defendants CHARLES MEYERS and JACK SCOVILLE were trustees of the East Side Levee and Sanitary District, East St. Louis, Illinois.

2. At other times pertinent hereto defendants CHARLES MEYERS and JACK SCOVILLE were candidates for trusteeship and trustees-elect for the East Side Levee and Sanitary District.

3. At times pertinent hereto, the trustees of the East Side Levee and Sanitary District occupied a position of public trust where through the exercise of their judgment, contracts were to be awarded to contractors and suppliers doing business with the East Side Levee and Sanitary District, East St. Louis, Illinois.

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[1] The statute provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * * * *

4. From on or about the month of September, 1972 to on or about January, 1973, in the Eastern District of Illinois, the defendants CHARLES MEYERS and JACK SCOVILLE and others did conspire to affect commerce by obtaining property of another, with his consent, induced under color of official right, that is to say CHARLES MEYERS and JACK SCOVILLE with others did conspire to obtain in excess of $6,000.00, individually, that the defendants were not entitled to, in consideration for their future official acts as trustees for the East Side Levee and Sanitary District so that the defendants CHARLES MEYERS and JACK SCOVILLE would suspend their independent and unbiased judgment on the merits when considering the awarding of contracts, all in violation of Title 18, United States Code, Section 1951.

In the defendants' motions to dismiss the indictment, they contended that they held no public offices at the time of the acts complained of, that they were merely candidates for office at that time, and that not being public officials at the time complained of they had not violated Title 18, Section 1951 and could not be prosecuted thereunder. The Government contended that while defendants were not public officials at the time of the payment of $6,000.00 to each of them, defendants thereafter were elected and did become public officials; that they kept said sums of money after becoming public officials; that they conspired to do so and that said conspiracy continued after they became public officials; and that they were therefore liable for violation of the provisions of 18 U.S.C. §1951. For the purpose of defendants' Motions to Dismiss, counsel for the parties entered into a stipulation of the following facts:

1. The defendants, MEYERS and SCOVILLE, took office as Trustees of the East Side Levee and Sanitary District on December 6, 1972, at 10:00 A.M. Neither defendant was a public office holder prior to December, 1972. Defendants were candidates for said office as a result of

a primary election in March, 1972 and the defendants were elected to said office on November 7, 1972.

2. A meeting between the defendants and the complaining witnesses occurred during the month of October, 1972 at which the indictment alleges a conspiracy was formed.

3. If money was paid to the defendants, it is alleged said payment occurred in October, 1972 before the defendants took office, and the defendants retained said money through May, 1973.

In the District Court's order granting the motion to dismiss, the District Court assumed that the stipulated facts precluded any conspiracy and dismissed the indictment, thereby depriving the Government of its right to present evidence supporting the charge of conspiracy.

The indictment charged that Meyers and Scoville and others during a period of time commencing in or about September, 1972, and terminating in or about January, 1973, did conspire to affect commerce by obtaining property (in excess of $6000) of another with his consent and induced under color of official right. As indicated in the indictment, the substance of the conspiratorial agreement was that Meyers and Scoville conspired to obtain money in excess of $6000, individually—money to which they were not entitled—in consideration for their future official acts as trustees for the East Side Levee and Sanitary District, so that they would suspend their independent and unbiased judgment on the merits when considering the awarding of contracts.

In the initial paragraph of its order granting the motions to dismiss,[2] the District Court stated:

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[2] The District Court's order is published in *United States v. Meyers*, 395 F. Supp. 1067 (E.D. Ill. 1975).

> This case presents the novel and interesting question whether candidates for political office can obtain property (i.e., $6000) from another with that person's consent induced under color of official right within the meaning of 18 U.S.C. §1951. [Footnote omitted.] 395 F. Supp. at 1068.

In the penultimate paragraph of its order, the District Court concluded that

> . . . A mere candidate for public office can not obtain property from another with that person's consent induced under color of official right.
>
> 395 F. Supp. at 1070.

We respectfully suggest that the issue as formulated by the lower court misses the mark. What the court appears to have overlooked is that Meyers and Scoville were not charged with the substantive offense of extortion; they were charged with conspiracy. Thus the question is not "whether candidates for political office can obtain property (i.e., $6000) from another with that person's consent induced under color of official right within the meaning of 18 U.S.C. §1951"; rather it is whether, within the meaning of the Hobbs Act, it is a crime for candidates for political office to conspire to affect commerce by extortion induced under color of official right during a time frame beginning before the election but not ending until after the candidates have obtained public office. As we said above, Meyers and Scoville were not charged with the substantive offense of extortion. They were charged with conspiracy to obtain property under color of official right. We agree with the Government that the indictment did not charge that they conspired "under color of official right." Rather, they were charged with conspiracy to obtain property "under color of official right." In essence, however, Meyers and Scoville urge this court to hold that the statutory phrase "under color of official right" modifies

the word "conspires" rather than the words, "obtaining of property from another". This would be an unreasonable interpretation.

Both the phrase "under color of official right" and the phrase "obtaining of property from another" appear in the same subparagraph,—subparagraph (2) of paragraph (b) of §1951,—and the phrase "obtaining of property from another" precedes the phrase "under color of official right". On the other hand, the only reference to conspiracy occurs in a different and parallel paragraph,—paragraph (a) of §1951,—where the word "conspires" appears. Thus, in accordance with established canons of statutory construction,[3] we can only construe §1951 to mean that the phrase "under color of official right" refers, relates back to, and modifies the phrase "obtaining of property of another," so that §1951 proscribes, not the act of conspiracy under color of official right, but the act of obtaining property under color of official right.

More important, however is the consideration of the Government's contention that even if the phrase "under color of official right" in §1951 (b)(2) were held to modify the word "conspires" in §1951(a), the alleged conspiracy existed even after Meyers and Scoville took office. The Government alleges that a conspiracy was entered into at a time when Meyers and Scoville were candidates for public office, that the alleged conspiracy did not end until at least May of 1973, at which time Meyers and Scoville had been public officials for several months, and that through May of 1973, Meyers and Scoville allegedly retained the money they had earlier obtained from the contractors.

What Meyers, Scoville, and the court below overlooked is the crucial factor of continuity in the crime of conspiracy. It is well settled that a criminal conspiracy is a continuing crime in that the conspiracy continues until the goal for which it was

formed has been attained. See, e.g., *United States v. James*, 161 U.S. App. D.C. 88, 494 F.2d 1007, 1026 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1974). Here the object of the conspiracy was the suspension of unbiased judgment in consideration for money received. The object of the conspiracy was not the suspension of the unbiased judgment of a private individual, but was the suspension of the unbiased judgment of a public official. This point seems to have been missed by the District Court as well as by Meyers and Scoville.

In view of the foregoing, we conclude that in the instant case the alleged conspiracy to obtain property under color of official right constitutes a crime under the Hobbs Act, even though Meyers and Scoville were private citizens at the inception of the conspiratorial agreement.

In its Brief in Opposition to the Defendants' Motion to dismiss, the Government asserted that Meyers and Scoville were in a viable position to obtain public office at the time they entered into the conspiracy, and that this viable position established a reasonable basis for belief on the part of the contractor-victims that Meyers and Scoville had the power to control the awarding of contracts in the future. The Government then cited two cases in support of this proposition: *United States v. Emalfarb*, 484 F.2d 787 (7th Cir. 1973), cert. denied, 414 U.S. 1064 (1973), and *United States v. Price*, 507 F.2d 1349 (4th Cir. 1975). The District Court in its order states that these cases "do not support the Government's proposition and are clearly distinguishable."

After discussing *Emalfarb* and *Price*, the court then states that in both of these cases the defendants raised the defense of impossibility, whereas the defendants in the instant case do not. True, in the opening paragraph of their Reply Memorandum, Meyers and Scoville explicitly disclaimed that they were raising impossibility of law or fact as a defense; however, in their Supplemental Reply Memorandum they ask:

> . . . Why was it impossible for the defendants to conspire "to obtain property under color"? Because the Government's stipulation clearly states that the agreement was that the "'property" be obtained prior to the defendant's election, and, in fact, the "property" was "obtained" prior to their election. [Emphasis added.]

Moreover, we agree with the Government that the concept of legal or factual impossibility as one basis for dismissing the indictment is implicit in the formulation of the issue presented to the District Court by Meyers and Scoville in their Memorandum in Support of Defendants' Motion to Dismiss, viz.,

> The issue squarely put is: Can a private citizen, who has been nominated for office, but not elected, extort money under color of official right. . . .

In essence, Meyers and Scoville contend that in order to violate the "under color of official right" part of the Hobbs Act, one must be a public official, and inasmuch as Meyers and Scoville were merely nominated for office but had not attained office, it was therefore impossible for them to violate that part of the Hobbs Act. We recognize that courts have been reluctant to accept the defense of impossibility when the charge is conspiracy, the reason being that such charge focuses primarily on the intent of the individual defendants. Therefore the impossibility that the defendants' conduct would result in consummation of the contemplated substantive crime is not persuasive or controlling. See, e.g., *Beddow v. United States*, 70 F.2d 674 (8th Cir. 1934), where the court held that there may be conspiracy to defraud the United States despite the fact that the fraud was impossible of commission because the court held that there may be conspiracy to defraud the United States despite the fact that the fraud was impossible of commission because the forged securities were not witnessed by the appropriate official.

The Government has invited our attention to a very recent case wherein the defendant was charged with violating the Hobbs Act "under color of official right" even though he had no de jure authority. In *United States v. Mazzei*, 521 F.2d 639 (3rd Cir. 1975), the defendant Mazzei, a state senator, was convicted of violating the Hobbs Act by taking money in exchange for the exercise of political influence over two decisions made in a state executive branch department, despite the fact that Mazzei had no official position in or control over that department. The Court of Appeals concluded that the evidence supported a finding that payments to Mazzei were induced by an exploitation of the payor's reasonable belief that Mazzei's position as a state senator provided Mazzei with effective control over the state leases involved in the case even though Mazzei lacked de jure authority to act. In an en banc decision, the Court of Appeals affirmed Mazzei's conviction and held:

> . . . But in order to find that defendant acted "under color of official right," the jury need not have concluded that he [Mazzei] had actual de jure power to secure grant of the lease so long as it found that Kelly [the victim] held, and defendant exploited, a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved. . . . 521 F.2d at 643.

The court found that the evidence, when reviewed in a light most favorable to the Government, permitted the jury to find that Kelly's belief that Mazzei had the de facto power to influence the State's leasing decisions was reasonable. As indicated in the indictment in the instant case, the Trustees of the East Side Levee and Sanitary District had the de jure power to award contracts, and the contractor-victims allegedly purchased the biased judgment of Meyers and Scoville, to be exercised after they attained office. In short, Meyers and Scoville are charged with having sold the de jure power which they would

acquire in the future. In the instant case, the motivation for payment by the contractor-victims of Meyers and Scoville thus focused not merely on a de facto power of influence-peddling, but on the de jure power which Meyers and Scoville would acquire when and after they became trustees. As we said in *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975):

> . . . So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951 . . .

The conviction of Mazzei was affirmed even though he never pretended to hold any executive department office nor did he pretend that he could personally award the leases.

We think that it is no less of a crime under the Hobbs Act to sell one's public trust before, rather than after, one is installed in public office. We hold that the conspiracy of Meyers and Scoville as charged in the indictment constitutes a crime within the meaning of the Hobbs Act. Therefore, the indictment should not have been dismissed. Accordingly, the order of the District Court granting the motion to dismiss the indictment is reversed and the cause is remanded for the purpose of reinstateing the indictment.

Reversed and Remanded.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 21, 1976

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. Joseph Sam Perry, District Judge

United States of America, Plaintiff-Appellant, vs. Charles Meyers and Jack Scoville, Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Illinois. No. 75-CR-27 E.

No. 75-1743

On consideration of the petition of the defendants-appellees for a rehearing or, in the alternative, for transfer to the Court *en banc* in the above-entitled appeal, and members of the panel having voted to deny a rehearing and the majority of the judges in regular service having voted to deny a rehearing *en banc*,

It Is Ordered that the petition of defendants-appellees for a rehearing in the above-entitled appeal be, and the same is hereby denied.

Chief Judge Fairchild, Judge Swygert and Judge Sprecher voted to grant a rehearing *en banc*.

APPENDIX E

In the District Court of the United States of America
For the Eastern District of Illinois

United States of America, Plaintiff, vs. Charles Meyers and Jack D. Scoville, Defendants.	Cr. No. 75-27-E.

STIPULATION

The following stipulation by and between counsel is entered for the purpose of Defendants' Motion to Dismiss. Counsel for all parties hereby stipulate to the following facts:

1. The defendants, MEYERS and SCOVILLE, took office as Trustees of the East Side Levee and Sanitary District on December 6, 1972, at 10:00 A.M. Neither defendant was a public office holder prior to December, 1972. Defendants were candidates for said office as a result of a primary election in March, 1972 and the defendants were elected to said office on November 7, 1972.

2. A meeting between the defendants and the complaint witnesses occurred during the month of October, 1972 at which the indictment alleges a conspiracy was formed.

3. If money was paid to the defendants, it is alleged said payment occurred in October, 1972 before the defendants took office, and the defendants retained said money through May, 1973.

The aforesaid stipulation is entered into by and between counsel for the purpose of defendants' motion to Dismiss.

s/ .....
JACK A. STRELLIS
Assistant United States
Attorney

s/ .....
JAMES GOMRIC

s/ .....
BRUCE COOK

No. 75-1833

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES MEYERS and JACK SCOVILLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

WILLIAM C. BROWN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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CHARLES MEYERS and JACK SCOVILLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 529 F. 2d 1033. The order of the district court (Pet. App. B) is reported at 395 F. Supp. 1067.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1976. A petition for rehearing was denied on May 21, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on June 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a candidate for public office, by corruptly agreeing to take money in exchange for his future

official acts in the awarding of public contracts, commits the Hobbs Act offense of conspiring to affect commerce by "the obtaining of property from another, with his consent, induced * * * under color of official right" (18 U.S.C. 1951(b)(2)).

STATEMENT

In a one count indictment returned in the United States District Court for the Eastern District of Illinois, petitioners were charged with having conspired to affect commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Pet. App. A). Prior to trial, the district court granted petitioners' motion to dismiss the indictment (Pet. App. B). On the government's appeal, the court of appeals reversed and remanded the case for trial (Pet. App. C).

For purposes of the motion to dismiss the indictment, the parties stipulated (Pet. App. E) that petitioners were candidates for the office of Trustee of the East Side Levee and Sanitary District in East St. Louis, Illinois, having obtained the nomination as a result of a primary election held in March 1972. Both petitioners were elected to that office in November 1972 and assumed their public duties in December 1972. Neither petitioner was a public office holder prior to December 1972.

The indictment alleged that from September 1972 until January 1973 petitioners conspired "to affect commerce by obtaining property of another, with his consent, induced under color of official right" (Pet. App. A1-A2). It alleged that petitioners conspired with others "to obtain in excess of $6,000.00, individually, that [petitioners] were not entitled to, in consideration for their future official acts as trustees * * * so that [petitioners] would suspend their independent and unbiased judgment on the merits when considering the awarding of contracts" (Pet. App. A2).

The parties stipulated that the conspiracy was formed, and the payments alleged in the indictment were made, if at all, in October 1972 (Pet. App. A19). It was also stipulated that, if such payments were made, petitioners retained the money through May 1973, after they had taken office (*ibid.*).

The district court granted petitioners' motion to dismiss the indictment, holding that "[a] mere candidate for public office cannot obtain property from another with that person's consent induced under color of official right" (Pet. App. A7).

The court of appeals reversed and remanded for the purpose of reinstating the indictment. It held that, "within the meaning of the Hobbs Act, it is a crime for candidates for political office to conspire to affect commerce by extortion induced under color of official right during a time frame beginning before the election but not ending until after the candidates have obtained public office" (Pet. App. A12)—*i.e.*, where "[t]he object of the conspiracy [is] not the suspension of the unbiased judgment of a private individual, but * * * the suspension of the unbiased judgment of a [future] public official," to be exercised after he takes office (Pet. App. A14). "Meyers and Scoville are charged with having sold the de jure power which they would acquire in the future. * * * We think that it is no less of a crime under the Hobbs Act to sell one's public trust before, rather than after, one is installed in public office" (Pet. App. A16-A17).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's pretrial dismissal of the indictment. That reversal puts petitioners in the same position as if the district court had ruled against them in the first instance, a ruling that would not have been

subject to interlocutory appeal. *United States ex rel. Rosenberg* v. *United States District Court*, 460 F. 2d 1233 (C.A. 3); *United States* v. *Garber*, 413 F. 2d 284 (C.A. 2).

Although this Court has jurisdiction of the case, even at this interlocutory stage, this is not a situation in which "any review by this Court * * * must be immediate to be meaningful." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331. On the contrary, if petitioners are tried and acquitted, the issue they tender here will not require final resolution in this case. If, on the other hand, they are convicted in the district court and their convictions are affirmed by the court of appeals, they will be free to present their contentions to this Court at that time in a fresh petition for a writ of certiorari raising the same issue as the one presented here.

In these circumstances, it would be appropriate for the Court to deny the present petition regardless of the merit it might have were the issue ripe for review after a final judgment. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327.

2. In any event, the decision of the court of appeals is correct, and further review is not warranted.

Petitioners concede that the Hobbs Act would be applicable if, at the time they agreed to take money in return for suspending their unbiased judgment in awarding public contracts, they had already assumed their official duties (Pet. 5-6). Their sole contention is that only a person who holds public office can induce another's consent "under color of official right." But nothing in the words or the purpose of the statute compels that result.

The Hobbs Act provision at issue was intended, in part, to prohibit extortion by the threatened or promised misuse of the public trust. The conduct alleged in the indictment is no less extortionate merely because petitioners were trading on their expected future public trust rather than an existing public trust. Although the "official right," under color of which petitioners allegedly extorted the payment of money, was contingent upon their election, that is a difference only in degree, not in kind. The extortion alleged in the indictment could not have succeeded but for the expectation that petitioners would be in a position to make or influence official decisions concerning awards of public contracts. "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951." *United States* v. *Braasch*, 505 F. 2d 139, 151 (C.A. 7), certiorari denied, 421 U.S. 910.

The court of appeals thus correctly held that "it is no less of a crime under the Hobbs Act to sell one's public trust [or to conspire to do so] before, rather than after, one is installed in public office" (Pet. App. A17).[1]

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[1]Neither *United States* v. *Kenny*, 462 F. 2d 1205, 1229 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914, nor *United States* v. *Crowley*, 504 F. 2d 992, 994-995 (C.A. 7), aids petitioners' argument. Those decisions merely reject the contention that it is necessary to prove extortion both by fear *and* under color of official right in order to establish a violation of the Hobbs Act by a public official.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

WILLIAM C. BROWN,
Attorney.

SEPTEMBER 1976.

DOJ-1976-09